[ORAL ARGUMENT HELD OCTOBER 17, 2008]

No. 07-5347

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,
Plaintiff-Appellant,

v.

SECRETARY OF STATE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEE'S OPPOSITION TO PETITION FOR REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici:

Plaintiff-Appellant is Menachem Zivotofsky.

Defendant-Appellee is the Secretary of State.

B. Rulings Under Review:

Appellant seeks review of the September 19, 2007 order and decision dismissing all of his claims by the United States District Court for the District of Columbia, Judge Gladys Kessler, in Civ. No. 03-1921 (GK). The district court's order appears at Joint Appendix (JA) 422 and the decision appears at JA 401 and is reported at 511 F. Supp. 2d 97. The panel decision of this Court affirming the district court's judgment is dated July 10, 2009, and is reported at 571 F.3d 1227.

C. Related Cases:

This case was previously before this Court. *See Zivotofsky v. Sec'y*, 444 F.3d 614 (D.C. Cir. 2006). We are unaware of any related case pending in this or any other court.

Respectfully submitted,

Lewis S. Yelin /s/

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Attorney for Appellee

September 15, 2009

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INTRODUCTION AND SUMMARY

Through his parents, Menachem Zivotofsky, a U.S. citizen born in Jerusalem, sued the Secretary of State, seeking to compel the Secretary to record "Israel" as his place of birth in his U.S. passport and consular report of birth abroad. For over fifty years, the United States' consistent policy has been to recognize no state as having sovereignty over Jerusalem, leaving that issue to be decided through negotiations by the parties to the Arab-Israeli dispute. In a prior appeal, this Court determined that Zivotofsky had standing to sue, and it remanded for development of the record, primarily concerning the foreign policy consequences of recording "Israel" in the passports of U.S. citizens born in Jerusalem. *Zivotofsky v. Sec'y*, 444 F.3d 614 (D.C. Cir. 2006). On remand, Zivotofsky argued that a statute requires the Secretary, upon request, to record "Israel" as the place of birth of any U.S. citizen born in Jerusalem. After considering the State Department's evidence, the district court dismissed the action because it presents a nonjusticiable political question.

Zivotofsky appealed. The panel majority held that the relief Zivotofsky requested — an order directing the Secretary of State to designate a citizen's place of birth abroad — directly implicates the "recognition" power that the Constitution textually commits solely to the President. The majority thus affirmed the district court's dismissal on political question grounds. Judge Edwards concurred in the judgment. Although he agreed with the majority that Zivotofsky's claim implicates

the President's recognition power, Judge Edwards would have ruled against Zivotofsky on the merits, holding unconstitutional the statute on which he relied.

There is no basis on which to grant Zivotofsky's petition for rehearing en banc. The panel majority and concurrence agree that the constitutional recognition power and the application of that power in designating a place of birth in U.S. passports "are matters within the exclusive power of the Executive under Article II, § 3 [of the Constitution], and neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition." Conc. Op. 22; *see* Maj. Op. 10 (same). The majority and the concurrence also agree that the district court correctly dismissed this suit. *Compare* Maj. Op. 12 *with* Conc. Op. 22. While they disagree on whether dismissal should be termed "jurisdictional" or "on the merits," they agree that the ground for dismissal is that the Constitution textually commits to the Executive Branch the sole authority to designate Zivotofsky's place of birth in his U.S. passport. Maj. Op. 10; Conc. Op. 22.

Citing precedent from the Supreme Court and this Court, the majority correctly held that once a court determines that a plaintiff is challenging a decision that the Constitution textually commits solely to the Executive Branch, the proper course is to dismiss the case for lack of jurisdiction, even in a case in which the plaintiff asserts a statutory right. *See, e.g., Nixon v. United States*, 506 U.S. 225 (1993); *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009); *Gonzalez-Vera v.*

Kissinger, 449 F.3d 1260 (D.C. Cir. 2006); *S. African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987); *Population Inst. v. McPherson*, 797 F.2d 1062 (D.C. Cir. 1986). Even were the Court inclined to revisit the Court's precedent characterizing such dismissals as "jurisdictional," this case does not present a proper vehicle to do so. Because "the bottom line of the court's judgment in this case is inescapable" (Conc. Op. 22), the Court would be better served to wait for a case in which the divergent approaches might be outcome determinative. Moreover, the status of Jerusalem remains one of the most sensitive issues in the Arab-Israeli conflict, as both the majority and the concurrence recognize. Maj. Op. 4, Conc. Op. at 16. All members of the panel agree that neither the courts nor Congress has authority to second-guess the Executive Branch's decision in this case, which "obviously aims to further the United States' policy regarding the recognition of Israel." Conc. Op. 16; *see id*. at 18, 22; *see* Maj. Op. 7–11. Where continued litigation in this case would not lead to a different outcome, the United States' foreign policy interests would best be served by denying the petition for rehearing en banc.

STATEMENT

1. As we explained in our brief before the panel, the status of Jerusalem is one of the most sensitive and long-standing disputes in the Arab-Israeli conflict. U.S. Br. 6–11. For the last sixty years, the United States' policy has consistently been that Jerusalem's status is a matter to be resolved by negotiation between the

parties to that dispute. Accordingly, a "central and calibrated feature of every president's foreign policy since Harry S. Truman" has been to "express no official view on the thorny issue of whether Jerusalem is part of Israel." Maj. Op. 2. The State Department's rules governing the identification of the place of birth in passports of U.S. citizens born in Jerusalem implements that foreign policy. *Id*. at 2–3; Conc. Op. 16. Under those rules, the state having sovereignty over a U.S. citizen's city of birth is usually recorded as the place of birth. U.S. Dep't of State, 7 FAM § 1330 app. D. But because the U.S. does not currently recognize the sovereignty of any state over Jerusalem, passports issued to U.S. citizens born there record only the city as the place of birth. *Id*. § 1360 app. D; *see* Revised 7 FAM § 1300 app. D *at* http://www.state.gov/documents/organization/94675.pdf.

2. Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002), entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem.[1] Section 214(d), the provision at issue in this case, states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guard-

[1] Congress has enacted provisions similar to Section 214 in subsequent legislation. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. J, § 107, 122 Stat. 1844, 2287.

ian, record the place of birth as Israel." At the time of enactment, the President stated that a mandate under Section 214(d) would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." 38 Weekly Comp. of Pres. Docs. 1658 (Sept. 30, 2002). Despite the fact that the President's statement made clear that "U.S. policy regarding Jerusalem has not changed" (*ibid*.), the statute provoked widespread international condemnation and confusion about U.S. policy toward Jerusalem (Maj. Op. 4 (discussing declassified State Department cables)).

3. Menachem Zivotofsky is a U.S. citizen born in 2002 in Jerusalem. Maj. Op. 4. In December 2002, Menachem's mother filed an application for a consular report of birth abroad and a U.S. passport for Menachem, listing Menachem's place of birth as "Jerusalem, Israel." Maj. Op. 4. U.S. diplomatic officials informed Mrs. Zivotofsky that State Department policy required them to record "Jerusalem" as Menachem's place of birth, which is how Menachem's place of birth appears in the documents the Zivotofskys received. *Id.* at 4–5.

On his behalf, Menachem's parents filed this suit against the Secretary of State seeking to compel the State Department to identify Menachem's place of birth as "Jerusalem, Israel" in the official documents. *Id.* at 5. This Court reversed the district court's initial dismissal and remanded for the district court to

develop a more complete record on the foreign policy implications of recording "Israel" as Zivotofsky's place of birth. *Zivotofsky v. Sec'y*, 444 F.3d 614 (D.C. Cir. 2006); *see* Maj. Op. 6. On remand, the State Department explained that if "Israel" were to be recorded as the place of birth of a person born in Jerusalem, such "unilateral action" by the United States (JA 58) on one of the most sensitive issues in the negotiations between Israelis and Palestinians "would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the [peace process]" (JA 59).

The district court again dismissed this suit on political question grounds. *Zivotofsky v. Sec'y*, 511 F. Supp. 2d 97, 102–03 (D.D.C. 2007). In a divided opinion, this Court affirmed. *Zivotofsky v. Sec'y*, 571 F.3d 1227 (D.C. Cir. 2009).

The panel majority (Griffith and Williams, JJ.) agreed that Zivotofsky's claim presents a nonjusticiable political question. Maj. Op. 12. "Following the framework laid out in *Nixon v. United States*," the majority began "by 'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." *Id*. at 7 (quoting 506 U.S. at 228); *see Baker v. Carr*, 369 U.S. 186, 217 (1962). The "issue" before the Court, as the majority saw it, "is whether the State Department can lawfully refuse to record [Zivotofsky's] place of birth as 'Israel' in the face of a

statute that directs it to do so." Maj. Op. 12. The majority determined that the President's textual authority to "'receive Ambassadors and other public Ministers' (U.S. Const. art. II, § 3) includes the power to recognize foreign governments" (Maj. Op. at 7; *see id*. at 8 (collecting cases)), and to decide "what government is sovereign over a particular place." *Id*. at 8 (collecting cases). Based on this precedent, the majority held that "the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem." *Id*. at 9. The State Department's determination to record "Jerusalem" as the place of birth in passports of U.S. citizens born in that city "implements this longstanding policy." *Ibid*. Zivotofsky's request that the courts order the State Department to record his place of birth as "Israel" "trenches upon the President's constitutionally committed recognition power." *Ibid*. Accordingly, the majority held, Zivotofsky's claim presents a political question. *Ibid*.

The majority recognized Zivotofsky's argument that he asked the Court "to do nothing more than interpret a federal statute — a task within our power and competence." *Id*. at 10. But the majority held that, in light of the President's sole constitutional authority to decide the issue presented by Zivotofsky's claim, the Supreme Court's and this Court's precedent required dismissal for lack of jurisdiction. *Id*. at 10–11. That a plaintiff claims a violation of a statutory right does not create jurisdiction in a case otherwise requiring review of a decision constitution-

ally committed solely to the President. Although courts are competent to interpret statutes, they "will decline to 'resolve [a] case through * * * statutory construction' when it 'presents a political question which strips us of jurisdiction to undertake that otherwise familiar task.'" *Id*. at 11 (quoting *Lin*, 561 F.3d at 506).

Judge Edwards concurred in the judgment. He agreed with the majority that, under the Constitution, "[t]he Executive has exclusive and unreviewable authority to recognize foreign sovereigns." *Id*. at 14. He further found it "obvious[]" that the Jerusalem passport policy "aims to further the United States' policy regarding the recognition of Israel." *Id*. at 16. And, like the majority, Judge Edwards concluded that as "these are matters within the exclusive power of the Executive * * *, neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition." *Id*. at 22.

However, Judge Edwards disagreed with the majority's framing of the central issue. He identified the issue as "[w]hether § 214(d) * * * which affords Zivotofsky a statutory right to have 'Israel' listed as the place of birth on his passport, is a constitutionally valid enactment." Conc. Op. 3. As he saw the statute's constitutionality as the central issue presented, Judge Edwards would not have affirmed the district court's dismissal on political question grounds. Conc. Op. 13. Instead, he would have held the statute unconstitutional because it "impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns." *Id*.

at 22. Thus, Judge Edwards would have affirmed the dismissal on the alternative ground that "Zivitofsky has no viable cause of action under § 214(d)." *Ibid*.

ARGUMENT

Through this suit, Zivotofsky seeks to have the courts impose on the Executive Branch his preferred foreign policy: recognizing Israel as sovereign over Jerusalem. *See* JA 27 (Zivotofsky Decl. ¶ 9) ("It is important to us as a matter of conscience and we believe it will be important to our children that, if born in Israel, they be recognized as natives of Israel, and that the country of birth not be erased nor omitted from their travel documents."); Pet. 12 (accepting the representation that a change in the Jerusalem passport policy would cause significant diplomatic harm "effectively perpetuates for eternity any misguided and erroneous practice or policy initiated by the State Department."). The panel majority and the concurrence agree this is something Zivotofsky cannot do because the Constitution vests this policy choice solely in the President. En banc consideration is not warranted to consider the point of disagreement between the majority and concurrence: whether this suit should be dismissed on jurisdictional grounds or on the merits.

1. The majority and the concurrence agree that the Executive Branch's decision to record Jerusalem as the place of birth of U.S. citizens born in that location is constitutionally committed to the President's sole discretion. Maj. Op. 10, Conc. Op. 17. That conclusion is amply supported by years of precedent.

The Constitution grants solely to the President the power to "receive Ambassadors and other Public Ministers." U.S. Const. art. II, § 3. The Supreme Court has long recognized that the logical implication of this authority is that the Constitution commits to the President the authority to recognize the foreign sovereign that sends the ambassador or public minister the President chooses to receive. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *United States v. Pink*, 315 U.S. 203, 229 (1942); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). A further logical corollary is that the President's recognition power "includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229. Because the President has the authority to establish the policy under which a foreign state is to be recognized, he has the power to decide, for purposes of U.S. law, which country has sovereignty over disputed foreign territory. *Baker*, 369 U.S. at 212; *Williams*, 38 U.S. (13 Pet.) at 420. And there can be no serious dispute about whether the State Department's passport policy regarding Jerusalem is encompassed within the President's recognition power. A passport "is a 'political document' that is 'addressed to foreign powers,' 'by which the bearer is recognized, in foreign countries, as an American citizen." Conc. Op. 18 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)); *see* Maj. Op. at 9. "A 'political document' indicating that a person born in Jerusalem is from the sovereign nation of Israel misstates the United States' position on the

recognition of Israel." Conc. Op. 18; *see* Maj. Op. 9.

2. The panel majority correctly held that Zivotofsky's claim is nonjusticiable under the political question doctrine. As the majority recognized, *Nixon v. United States* instructs courts considering whether a case presents a political question to "begin by 'interpret-[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." Maj. Op. 7 (quoting 506 U.S. at 228). Zivotofsky claims a statutory right to have Jerusalem recorded as the place of birth on his passport. As the majority and concurrence both determined, the State Department's Jerusalem passport policy is an exercise of the President's recognition power. The decision how to record in a U.S. passport the place of birth of a citizen born in Jerusalem is thus exclusively committed to the Executive Branch by the Constitution. Zivotofsky's claim challenges that decision and hence raises a political question. Thus, the State Department can lawfully refuse to record Zivotofsky's place of birth as "Israel," and any claim seeking to have a court order the State Department to do so is nonjusticiable under the political question doctrine. Maj. Op. 7–9.

The panel majority recognized that Zivotofsky's claim of right is based in a statute. Maj. Op. 10. But for the reasons the majority gave, this fact, standing alone, does not transform Zivotofsky's claim into a justiciable controversy. Courts are, of course, fully competent to interpret statutes and to decide questions con-

cerning the separation of powers. *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). But under *Nixon*, once a court determines that an issue is textually committed by the Constitution to a political branch of government, that conclusion resolves the case, whether or not a statute is also at issue.

Contrary to Zivotofsky's assertion, this is not a case in which the majority dismissed on political question grounds simply because the challenged "regulations implemented foreign policy." Pet. 5; *see id*. at 4 (citing *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988), for proposition that claims of right are not nonjusticiable simply because "they implicate foreign policy decisions"). Rather, the panel majority, like the Supreme Court in *Nixon*, dismissed the case on political question grounds only after "'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch," and determining that the designation of a place of birth for purposes of a passport is textually committed to the Executive. Maj. Op. 7 (quoting *Nixon*, 506 U.S. at 228); *see Nixon*, 506 U.S. at 238 (dismissing on political question grounds "after exercising [the Court's] delicate responsibility" as "ultimate interpreter of the Constitution" to ensure that the challenged action is one committed by the Constitution to the authority of the political branch) (quoting *Baker*, 369 U.S. at 211). Thus, the panel majority did not suggest that a court must blindly accept the Executive's assertion that the sub-

ject of the dispute lies within its textually committed authority.

The majority's approach is congruent with this Court's precedent. Recently, in *Lin v. United States*, the Court held that plaintiffs' claim — turning on Taiwan's status — came within the President's recognition power and so presented a political question. *See* 561 F.3d at 503–04. The *Lin* plaintiffs argued, as does Zivotofsky, that their case involves "a straightforward question of treaty and statutory interpretation well within the Article III powers of the court." *Id*. at 506. While the Court agreed that it "*could* resolve this case through treaty analysis and statutory construction," it "decline[d] to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task." *Ibid*.

Lin was itself not groundbreaking. The Court previously held that plaintiffs' claims based on statutory right can still be nonjusticiable so long as they present political questions textually committed to the political branches. *Gonzalez-Vera*, 449 F.3d at 1264 (a statutory claim "may not be heard if it presents a political question." (citations omitted)). And prior to *Gonzalez-Vera*, the Court in other cases considered first whether a statutory claim involved an issue constitutionally committed to a political branch before reaching the merits. *S. African Airways,* 817 F.2d at 123*; Population Inst.*, 797 F.2d at 1070; *see* Maj. Op. 10–12.

3. In any event, the Court and the United States' foreign policy interests would be better served if the Court were to wait for a more appropriate vehicle if it

wishes to reconsider the proper basis for dismissal of claims based on statutory right, but implicating a power textually committed to the Executive Branch by the Constitution. Under *Nixon*, the critical issue is "whether and to what extent the issue is textually committed" to a coordinate branch of government. 506 U.S. at 228. In this case, the "extent" of the textual commitment is not reasonably disputable. The majority and the concurrence agree that the State Department's passport policy is a direct exercise of the President's recognition power. *See, e.g.*, Maj. Op. 9, Conc. Op. 16. For that reason, "the bottom line of the court's judgment in this case" — dismissal — "is inescapable." Conc. Op. 22. Moreover, the status of Jerusalem remains one of the most sensitive issues in the Arab-Israeli dispute. Continued litigation in this case creates the possibility of doubt about whether the President speaks for the Nation in determining U.S. recognition policy concerning Jerusalem. Where further litigation in this case would not lead to a different outcome, U.S. foreign policy interests would best be served by denying the petition.

4. Finally, the petition should be denied because Zivotofsky identifies no compelling reasons for rehearing en banc. Zivotofsky presents three arguments in support of rehearing. First, he contends that the majority erred in affirming dismissal on political question grounds because all the court had to do was interpret a statute. Pet. 2–6. But Zivotofsky nowhere addresses the framework established by the Supreme Court in *Nixon v. United States*, which was central to the major-

ity's decision (*see, e.g.,* Maj. Op. 6–7). Similarly, Zivotofsky nowhere discusses the majority's reliance (*see* Maj. Op. 11) on this court's prior cases such as *Lin*, which make clear that this Court will decline to adjudicate claims of statutory right when those claims present nonjusticiable political questions.

Zivotofsky next argues that en banc review is required to address his argument, which, he complains, was "ignored by both the majority and concurring opinions" (Pet. 6), that the President must abide by every provision in a statute he chose to sign (*id*. at 6–10). But it has long been settled that the President need not comply with a statutory provision that infringes his constitutional authority. *See, e.g., Myers v. United States*, 272 U.S. 52 (1926); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 841 n.12 (1976) (that President signed legislation does not prevent him from challenging statute's constitutionality) (discussing *Myers*), *overruled on other grounds by Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985).

Lastly, Zivotofsky seeks en banc review of the question whether Section 214(d) impermissibly infringes on the President's recognition power. Pet. 10–12. But as the majority and the concurrence concluded (Maj. Op. 9–10; Conc. Op. 15–18), and as discussed above, there can be no reasonable dispute on this issue.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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September 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2009, I caused the foregoing Appellee's Opposition To Petition for Rehearing en Banc to be filed with the Court and served upon counsel by using the CM/ECF filing system. In addition, I caused courtesy copies to be served upon the following counsel by U.S. mail and electronic mail as indicated:

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